Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petition of OLS, Inc. and TeleUno, Inc.	)	
for Declaratory Ruling on Application of	)	**WC Docket No. 09-28**
Sections 201(b) and203(c) to Carrier	)	
Practices and Charges	)	

COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

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Summary

The petition is procedurally improper and therefore does not even remotely meet the standards for a declaratory judgment action, is substantively baseless and grant of which would constitute bad public policy.

First, there is no basis for the grant of a declaratory judgment under section 1.2 of the Commission's rules. The Court has resolved the significant issues between the parties on which petitioners seek declaratory relief. Petitioners are entitled to only one bite at the apple. Petitioners knowingly availed themselves of the jurisdiction and processes of the Court and sought to invoke the doctrine of primary jurisdiction only after they lost. That is simply too late.

Second, the petition is substantively baseless. Section 203(c) is inapplicable on its face as there are no tariffs involved in this proceeding. The section 201(b) claim is equally baseless as the entire predicate of petitioners' tale of woe – namely, that Global Crossing assessed *invalid* charges upon them – is fiction.

Third, grant of the petition would constitute bad public policy. Placing the petition of Public Notice was itself a mistake as it will do no more than encourage litigants to try their luck in court first and only seek recourse from the Commission when they lose. This tactic would (and to some degree already has) turned the doctrine of primary jurisdiction on its head.

Moreover, a broad declaration that MMUCs are unenforceable will not, as petitioners have it, ensure the availability of broad-based resale opportunities to benefit consumers. It will simply deter wholesale carriers from extending discounts to resellers or dealing with resellers at all.

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Introduction and Summary

Pursuant to the Bureau's Public Notice,[1] Global Crossing Telecommunications, Inc. hereby submits these comments on the petition of OLS, Inc. and TeleUno, Inc. for declaratory ruling.

Petitioners are adept at filing disputes. They are less adept at paying bills. Petitioners were quite content to take the rate concessions that they acknowledge in the agreements at issue Global Crossing afforded them. They are far less adept at performing their side of the bargain – namely, paying for services rendered, including the minimum monthly usage charges ("MMUCs") to which they freely assented. Petitioners are also adept at asserting that Global Crossing failed to adhere to the terms of written agreements and at asserting that the contract documents are meaningless when allegedly contradicted by the words of low-level sales personnel. Petitioners were quite adept at filing a lengthy summary judgment motion before the District Court (in lieu of seeking to have this matter referred to the Commission in the first instance) and more adept at coming crying to this Commission when the Court rejected their

[1] *Public Notice,* DA 09-1788, Pleading Cycle Established for Petition of OLS, Inc. and TeleUno, Inc. for Declaratory Ruling on Application of Sections 201(b) and 203(c) to Carrier Practices and Charges, WC 09-28 (rel. Aug. 11, 2009) ("Notice").

motion and determined the liability issues favorable to Global Crossing.[2] In short, these are not petitioners and this is not a petition that merit consideration by the Commission.[3] Moreover, the petition is procedurally improper and therefore does not even remotely meet the standards for a declaratory judgment action, is substantively baseless and grant of which would constitute bad public policy.[4]

First, there is no basis for the grant of a declaratory judgment under section 1.2 of the Commission's rules.[5] The Court has resolved the significant issues between the parties on which petitioners seek declaratory relief. Petitioners are entitled to only one bite at the apple. Petitioners knowingly availed themselves of the jurisdiction and processes of the Court and sought to invoke the doctrine of primary jurisdiction only after they lost. That is simply too late.

Second, the petition is substantively baseless. Section 203(c) is inapplicable on its face as there are no tariffs involved in this proceeding. The section 201(b) claim is equally baseless as the entire predicate of petitioners' tale of woe – namely, that Global Crossing assessed *invalid* charges upon them – is fiction.

Third, grant of the petition would constitute bad public policy. Placing the petition of Public Notice was itself a mistake as it will do no more than encourage litigants to try their luck in court first and only seek recourse from the Commission when they lose. This tactic would (and to some degree already has) turned the doctrine of primary jurisdiction on its head.

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2 *See Global Crossing Bandwidth, Inc. v. OLS, Inc.,* 566 F. Supp. 2d 196 (W.D.N.Y. 2008); *id.,* 2009 US Dist LEXIS 22402 (W.D.N.Y. March 19, 2009).

3 *Cf. OLS, supra,* 556 F. Supp. 2d at 214.

4 In addition to the September 2008 Petition, petitioners also filed a petition in April 2009. That document added nothing of substance to the September petition and consists largely of *ad hominem* attacks on the prior Commission administration, Commission staff and Global Crossing.

5 47 C.F.R. §1.2.

Moreover, a broad declaration that MMUCs are unenforceable will not, as petitioners have it, ensure the availability of broad-based resale opportunities to benefit consumers. It will simply deter wholesale carriers from extending discounts to resellers or dealing with resellers at all.

Factual and Procedural Background

Significant Disputes between the Parties

OLS and TeleUno are commonly controlled entities and are former wholesale customers of Global Crossing. Both were quite adept at disputing bills and far less adept at paying for services rendered. As a result of petitioners' failure to pay their bills, Global Crossing terminated service and commenced an action in the United States District Court for the Western District of New York seeking in excess of $1.9 million in damages.

The contracts at issue contained minimum usage guarantees ("MUGs"), in the form of minimum *monthly* usage charges ("MMUCs"). The OLS contract provided that beginning on the third month, OLS would be liable for a minimum *monthly* charge of $100,000 and beginning with the eighth month, $250,000. The TeleUno agreement provided for a monthly charge of $150,000. *OLS, supra,* 556 F. Supp. 2d at 199-200. The enforceability of the MMUCs is the principal, if not the sole, focus of the Petition. [6]

6 In their counterclaims [No. 6:05-cv-6423, Dkt. #10, ¶¶18-41, 42-91 (W.D.N.Y.) (hereinafter "Dkt.# ___") (available on PACER)], petitioners also identified primary interexchange carrier change ("PIC-C") charges and a variety of miscellaneous disputes as allegedly invalid charges. With respect to the PIC-C charges, the Court concluded that petitioners, not Global Crossing, had failed to follow the Commission's rules in resolving the thousands of consumer complaints that petitioners slammed them. *OLS, supra,* 556 F. Supp. 2d at 206-09. The miscellaneous disputes amounted to a tiny percentage of the total consideration due under the agreements even prior to consideration of any credits that Global Crossing issued or offered. Petitioners have, moreover, dropped these claims in the litigation. *See Defendants' Responses to Global Crossing Bandwidth, Inc.'s Second Set of Interrogatories and Request for Production of Documents* at 5, attached hereto as Exhibit A. Neither the PIC-C charges nor the miscellaneous disputes appear to form the basis for the petition, but even if they do, those claims are as meritless as the MMUC claims.

Petitioners assert that the MMUCs are invalid charges. From that predicate, petitioners attempt to weave a grand theory that Global Crossing attempted to bill invalid charges (principally, if not exclusively MMUCs), arbitrarily denied petitioners' disputes of these invalid charges, threatened to disconnect petitioners for nonpayment of these invalid charges and then sought to "leverage" the threat of disconnection to entice contract extensions for increased minimums in exchange for "forgiveness" of the disputed amounts. Petition at 4-7, 18-19. This claim is the product of either excessive zeal or a fanciful imagination. It is totally unsupported by any evidence and indeed is contradicted by the key documentary evidence in the case. What petitioners seem to forget is that if the charges Global Crossing billed and attempted to collect were *valid – as the Court concluded they were* – then petitioners' entire house of cards falls as the subsequent events of which petitioners complain could not, by definition, be unlawful or unreasonable.

The Cross-Motions for Summary Judgment

Defendants did not seek a primary jurisdiction referral to the agency in the first instance. Rather, defendants (petitioners here) made a conscious, tactical decision to file a motion for summary judgment raising essentially the same allegations that they are now attempting to raise in the Petition.

Global Crossing cross-moved for summary judgment on the basis of the unambiguous documentary record, applicable law and FCC regulations.

The Court's Decision on the Motions for Summary Judgment

In relevant part, the Court denied defendants' motion for summary judgment and granted Global Crossing's. As to the MMUCs, the Court observed that petitioners were attempting to rewrite the agreements to which they voluntarily assented:

> First, I note that on their face, these provisions clearly did not contemplate any sort of "aggregate usage" arrangement. In other words, the contracts did not provide that defendants would be excused from meeting their MMUCs in any given month as long as their total usage over the entire contract period met or exceeded the aggregate of the MMUCs during that period . . . . The contract is quite clear on that point.

OLS, supra, 556 F. Supp. 2d at 203 (citations omitted).[7]

The Court further held that defendants' claim that they never received any rate concessions in exchange for the MMUCs was a convenient, *post hoc* misinterpretation of the agreements:

> As stated, the contracts also set forth a *quid pro quo* between the parties. Global gave consideration, in the form of rate concessions, for the MMUCs. Each agreement stated that the "make up to minimum charges, shortfall charges and surcharges for which [OLS or TeleUno] was] liable under this Agreement [we]re based on agreed upon minimum commitments on [OLS's and TeleUno's] part and corresponding rate concessions on Global Crossing's part . . . . " Thus, this was not simply a one-sided provision, the benefits of which inured only to Global, but a mutual agreement imposing obligations, and conferring benefits, on both sides. . . . *Defendants were not "mom and pop" stores but sizeable entities engaging in a complex business involving millions of dollars."*

Id. (emphasis added).[8]

Having rejected defendants *post hoc* and facially implausible interpretations of the agreements into which they freely entered, the Court proceeded to deny defendants' motion and grant Global Crossing's.

It found that the MMUCs – as written and as implemented -- were fully enforceable under New York law. *OLS, supra,* 556 F. Supp. 2d at 200-205.

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7 The petition asserts that the MMUCs are unreasonable because petitioners met an "aggregate" commitment. Petition at 9. As the Court makes clear, there was no aggregate commitment, Petitioners are simply trying to rewrite the agreement.

8 The claim that petitioners received no *quid pro quo* in the form of rate concessions is a central thesis of the petition. Petition at 15-17. As the Court makes clear, this claim is directly contradicted by the unambiguous terms of the agreements.

The Court also specifically considered and rejected petitioners' claim that the MMUCs violated the Communications Act. Relying upon this Commission's decision in *Ryder Communications, Inc. v. AT&T Corp.,* 18 FCC Rcd. 13603 (2004), the Court held that the MMUCs were fully consistent with the Communications Act. *OLS, supra,* 556 F. Supp. 2d at 205-206.[9]

Thus, on the principal liability issues in the case that petitioners attempt to raise here, the Court squarely rejected their claims. The Court fully and fairly considered defendants' state law and, more importantly in this context, Communications Act claims and found them to be without merit.

The Motion for Stay

The reason that defendants proffered to the Court for tactically moving for summary judgment and awaiting decision *and filing their petition only after they lost,* is that:

> It could not have been anticipated that the *Decision and Order* [of the Court] would have dealt with the FCA in the manner in which it did, by, as shown herein, misconstruing the applicable facts and precedent and by failing to address FCA provisions.[10]
>
> *and*
>
> Given the procedural posture of the case, there was little reason for Defendants to seek relief from the FCC prior to the issuance of the *Decision and Order.*[11]

Not surprisingly, the Court denied petitioners' motion for stay on multiple grounds:

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9 The Court also rejected defendants' assertion that Global Crossing impermissibly billed PIC-C charges to them. The Court correctly held that under the agreements and under controlling FCC regulations, Global Crossing had no duty to "demonstrate that the [charges relating to complaints lodged by *thousands of subscribers*] were valid" or "to give 'good faith' consideration' to the evidence that defendant had presented to it." *Id.,* 556 F. Supp. 2d at 207.

10 Defendants' Memorandum in Support of Motion for Stay [Dkt. # 94 at 4 n.3].

11 *Id.* at 11.

> In my view, the same reasoning applies here. Defendants certainly could have raised the primary jurisdiction matter much earlier in the litigation, but they chose instead to wait after the Court had ruled adversely to them in certain respects in the summary judgment decision. Defendants' contention that "[i]t could not have anticipated" that the Court would have ruled the way it did (according to defendants by "misconstruing the applicable facts and precedent and failing to address" certain relevant provisions, Defendants' Mem. (Dkt. #94) at 4 n.3) *rings hollow, as is little more than an admission that defendants were simply not expecting an adverse ruling* from the Court on the summary judgment motions.

OLS, supra, 2009 US Dist LEXIS 22402, *12 (emphasis added).

The Court further concluded that:

> Simply arguing that the Court "got it wrong," however, does not equate to a showing that the relevant issues are outside the "conventional expertise" of the Court, that they "involve technical or policy considerations within the agency's particular field of expertise," or that they lie "particularly within the agency's discretion." *Defendants' arguments amount to little more than a request for a "second bite at the apple" in a different forum,* which is not a proper basis for the application of the primary jurisdiction doctrine."

OLS, supra, 2009 US Dist LEXIS 22402, *14 (emphasis added).

Finally, the Court observed:

> [I]t bears repeating that defendants chose to file their FCC petition *after* this Court ruled on the summary judgment motions, and at the same time, filed their motion for a stay in this Court. **Defendants should not be permitted to manufacture a risk of inconsistent rulings by first seeking summary judgment in this Court and, only after they are unsuccessful in doing so, filing a petition with the FCC, and then using that petition to belatedly seek a stay of further proceedings.**

OLS, supra, 2009 US Dist LEXIS 22402, **17-18 (emphasis in bold; italics in original).[12]

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12 Sadly, but not surprisingly, petitioners cite the risk of inconsistent decisions as a purported justification for the petition. Petition at 13-14.

The Petition

The petition constitutes nothing more than a sour grapes rehash of the Court's decision denying defendants' summary judgment motion. Petitioners ask the commission to rule that because Petitioners achieved their "aggregate" commitment, the *monthly commitment to which they freely assented* constitutes a section 201(b) violation. Petition at 15-18. Prior Commission precedent squarely forecloses this result. They further want the Commission to rule that Global Crossing's "practices" of billing "invalid" charges, and using those allegedly invalid charges in "coercing contract extensions," "threatening disconnection," etc. violated section 201(b) of the Communications Act. *Id.*, at 18-19. The problem with this argument is that the factual predicate is fantasy. The charges in question that Global Crossing billed and attempted to collect are fully valid and enforceable. And, to add insult to injury, they want a ruling that it is a violation of section 203(c) to charge rates that allegedly do not appear *in a contract* governing a transaction that is exempt from section 203's tariff-filing requirements in the first instance. *Id.* at 19-21. As the contracts at issue were exempt from any tariff-filing requirement, this claim is silly.

Argument

I. THE PETITION DOES NOT PRESENT A PROPER SUBJECT FOR A DECLARATORY RULING.

Section 1.2 of the Commission's rules provides that the Commission may "in accordance with section 554(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."[13]

Petitioners fail to meet this standard. The issues that the petitioners raise for consideration (see Petition, ¶ 39) raise no controversy or admit of no uncertainty. The District Court has squarely held that Global Crossing's MMUCs and the PIC-C charges that it assessed

[13] 47 C.F.R. § 1.2.

upon defendants were valid under both New York law and under the Communications Act. The Court's decision resolves the principal issues of liability in favor of Global Crossing and against defendants. Petitioners may not like those decisions and, at the appropriate time, they may appeal those determinations to the United States Court of Appeals for the Second Circuit.

What petitioners may not do, as the District Court correctly held, is to have a second bite at the apple. *OLS, supra,* 2009 US Dist. LEXIS 22402, **10-11. In this conclusion, the District Court is undoubtedly correct. In *CSX Transp. Co. v. Novolog Bucks County,* 502 F.3d 247 (3d Cir. 2007), the Third Circuit upheld a District Court's denial of a primary jurisdiction motion where the movant waited until after it had lost in the District Court to seek a primary jurisdiction referral, concluding that the movant was not entitled to a "second bite of the apple." 502 F.3d at 253. Here, the District Court denied petitioners untimely motion for a stay.[14]

Petitioners' reliance on *Home Owners' Long Distance*[15] as support for the propriety of the petition is woefully misplaced for two reasons. *First,* in *HOLD,* the District Court expressly *reserved judgment* on the question germane to the litigation that was presented to the Commission (in that case, the enforceability of limitation of liability provisions in a tariff). *HOLD, supra,* 14 FCC Rcd. 17139 at ¶ 6. Here, of course, the issue of the enforceability of the MMUC provisions has already been decided. *Second,* as a result of subsequent developments, the Commission *declined to issue the requested declaratory ruling.* It declined to issue the ruling because such a ruling "[was] not necessary to assist the Court in resolving the referred

14 Petitioners' motion in the Court did not ask the Court to refer the matter to the FCC, knowing presumably that petitioners had waived that right. *See, e.g., Kohl v. Woodhaven Learning Center,* 676 F. Supp. 945-036-37 (W.D. Mo. 1987) ("defendants' failure to raise this jurisdictional challenge in their answers, in their motions to dismiss, or in their summary judgment motions barred these challenges under the doctrines of waiver and estoppel."); *Chabner v. United of Omaha Life Ins. Co.,* 225 F.3d 1042, 1051 n.8 (9th Cir. 2000) (defendants' assertion of primary jurisdiction doctrine rejected on the merits after plaintiff argued that defense was waived by defendant's failure to raise it until after district court had granted summary judgment.").

15 *Home Owners' Long Distance, Inc.,* Order, 14 FCC Rcd. 17139 (Enf. Div. 1999).

issue." *Id.*, ¶ 13. The Commission also concluded that "given the particular circumstance of this matter, reaching the merits of HOLD's petition is *not appropriate* to terminate a controversy or remove uncertainty." *Id.*, ¶ 14 (emphasis added). The same conclusion applies here and *HOLD* actually supports Global Crossing's position that the Commission should dismiss the petition as failing to meet the standards of section 1.2 of the Commission's rules.

Petitioners are simply manufacturing a controversy where none exists. The petition on its face is deficient for failure to demonstrate the existence of a live controversy or uncertainty.

II. THE PETITION IS SUBSTANTIVELY BASELESS.

Petitioners seek three declarations: (1) MMUCs as applied in this case are unjust and unreasonable under section 201(b) of the Act; (2) alleged "practices" of charging amounts allegedly not due, rejecting disputes and then leveraging contract extensions are unjust and unreasonable practices; and (3) charging rates that do not appear in a contract violates section 203(c) of the Act. Petitioners claims lack merit under existing FCC precedent and the Act or depend upon factual assertions that are contrary to reality. To the extent that the Commission is inclined to address the merits of the petition (which it should not), it should summarily deny it.

A. Commission Precedent Supports the Enforceability of MMUCs.

Ex post, petitioners do not like the contracts they entered into with Global Crossing. Based upon a retrospective review of the history of the relationship, petitioners wish they had entered into contracts that only contained an aggregate minimum commitment or none at all. Petitioners frame the question as to whether:

> MMUCs that are imposed despite the payment of all charges . . . that in the aggregate for its full term, exceed the minimum charges based on fractional portions of the term, violate Section 201(b)'s prohibition against unjust and unreasonable charges.

Petition at 2.

Had petitioners wanted an aggregate term commitment, they should have bargained for one. They didn't. They freely executed agreements that the unambiguously contained *monthly* commitments. Petitioners were just fine with receiving the discounted rates that they acknowledged in the Agreement that they received. When it came time for petitioners to perform, however, their obligation suddenly becomes a penalty and an unjust and unreasonable practice. Not surprisingly, petitioners can find no FCC precedent that supports this spurious claim.[16]

To the contrary, the relevant FCC precedent directly undercuts petitioners' claim. In *Ryder Communications, Inc. v. AT&T Corp.,* 18 FCC Rcd. 13603 (2003), the FCC upheld a contract that *also* contained a time-based revenue commitment, in that case, a minimum *annual* usage charge. The Commission, in analysis directly applicable here, held:

> [it] has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments. Many of these provisions required individual customers, like Ryder, to pay charges similar, if not equivalent to, the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments. In approving these provisions, the Commission recognized implicitly that they were a *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because, carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs.

Ryder, supra, 18 FCC Rcd at 13617.

[16] Petitioners devote a significant number of trees addressing the doctrine of primary jurisdiction (Petition at 13-19.) Petitioners seem to forget: (a) that a primary jurisdiction argument is supposed to made in the first instance to the Court, not to the Commission; and (b) the Court, in fact, addressed *and rejected every argument* petitioners raised.

The Court relied upon *Ryder* in denying petitioners' motion for summary judgment and granting Global Crossing's motion. Petitioners can only nitpick at *Ryder* claiming that it was limited to its facts. Petition at 14. The language from *Ryder* clearly indicates to the contrary and the factual predicates for the claim (*e.g.*, petitioners never received any quid pro quos) have been squarely rejected by the Court and are contrary to petitioners' own acknowledgements in the agreements in any event. *See supra* at 5. Petitioners simply rehash those claims here.[17]

In sum, petitioners' assertions that the MMUCs themselves are contrary to the Communications Act has already been soundly rejected by the Commission.

B. Petitioners' "Pattern and Practice" Allegations Are an Exercise in Fiction.

Petitioners claim that Global Crossing violated section 201(b) of the Act by billing *invalid* charges, denying petitioners' disputes of those *invalid* charges, threatening to disconnect service for non-payment of those *invalid* charges and then "extorting" contract extensions in exchange for forgiveness of those *invalid* charges. Petition at 5-7, 18-19.

The problem with the argument is that the premise is false. The charges that Global Crossing billed were, in fact, valid and fully enforceable. Therefore, Global Crossing's attempts to collect those charges and take other actions consistent with the agreements cannot, by definition, be unjust, unreasonable or otherwise unlawful. And, far from constituting "extortion," offering petitioners the ability to "work off" the unpaid minimums by contract extensions is actually favorable to petitioners and, if they did not care to do so, they simply could have paid the MMUCs that were due and owing. This claim is pure fiction.[18]

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17 Petitioners also ask the Commission to act to avoid the risk of inconsistent decisions. Petition at 20-21. Of course, any such risk is one completely manufactured by petitioners. *See supra* at 7.

18 Petitioners assert that Global Crossing never billed MMUCs during the lives of the agreements, but only billed them in their entirety at the end. Petition at 19 n.13. This claim is patently false. Global Crossing, in fact, billed petitioners MMUCs when there were monthly shortfalls. It billed

C. Petitioners' Section 203(c) Claim Lacks Merit.

Section 203(c) provides, in relevant part, that:

> no carrier, *unless otherwise provided by or under authority of this statute* shall charge, demand, collect or receive a greater or less or different compensation for communications or for any service in connection therewith ... than the charges specified in [the] schedule then in effect.[19]

The agreements at issue here are carrier-to-carrier *contracts* entered into pursuant to section 211 of the Act, which permits such arrangements outside the tariffing process. Thus, there are no tariffs that govern the services that Global Crossing provided to petitioners. As such, section 203(c) is facially inapplicable.

Petitioners' only rejoinder is that, "detariffing did not alleviate carriers from their duties . . . not to charge rates different from those agreed to for the services provided or to charge when no services are provided." Petition at 20 n.15. Petitioners provide zero support for this remarkable assertion, which is not surprising as it is wrong as a matter of law.

It is wrong simply because section 203(c) exempts from its scope transactions that are permissible under other sections Act through arrangements other than tariffs. Section 211, which permits carrier-to-carrier contracts, is such an exception. *See MCI Telecoms Corp. v. AT&T Co.*, 512 U.S. 218, 232 n.5 (1994). As such, petitioners' section 203(c) claim is legally baseless.[20]

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an "MMUC to term" when it terminated the agreements early for OLS's and TeleUno's breaches, as the contracts permitted it to do. *See* Complaint [Dkt. # 1], Ex. A, § 5.5E (OLS Agreement); Ex. B, § 5.5E (TeleUno Agreement); Ex. C (account reconciliation); Ex. D (invoices). This is yet one more example of petitioners' casual disregard for the facts.

19 47 U.S.C. §203(c) (emphasis added). Petitioners conveniently omit the italicized language when quoting the statute. Petition at 20 n.15.

20 It is logically contradictory as well. Petitioners acknowledge that the agreements *contain* MMUCs. If applicable, section 203(c), which embodies the filed-tariff doctrine, would *require* Global Crossing to *charge those MMUCs. See MCI, supra.* On petitioners' own theory, their 203(c) claim fails.

III. GRANT OF THE PETITION WOULD CONSTITUE INAPPROPRIATE PUBLIC POLICY.

Petitioners ask the Commission to discard over twenty years of Commission precedent on the basis of the unfounded, unsupported and untrue allegation that they are "dependent" upon their underlying carrier – Global Crossing. (Petition at 5-6.) In deciding to exercise its forbearance authority to amend section 43.51 of the Commission's rules to exempt from filing carrier-to-carrier contracts entered into pursuant to section 211 of the Act, the Commission held:

> We tentatively concluded in the *Notice* that the same reasons supporting the policies adopted in *Competitive Carrier* justify elimination of the requirement that non-dominant carriers treated with forbearance file certain reports and contracts.[10]
>
> [10]In the *Competitive Carrier Proceeding*, we defined non-dominant carriers as those carriers that, due to the presence of competition, lack any substantial ability to control prices in the marketplace *or to engage in anti-competitive practices as proscribed by Sections 201-205 and 214 of the Communications Act.*[21]

The Commission has consistently relied upon market forces to constrain unreasonable behavior and, indeed, has held that, absent proof of market failure, allegations of unreasonable or unreasonably discriminatory conduct against a non-dominant carrier cannot be sustained. *See, e.g., Orloff v. Vodafone Air-Touch Licenses,* 17 FCC Rcd 8987 (2002), *aff'd, Orloff v. FCC,* 352 F.3d 415 (D.C. Cir. 2003).[22]

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21 *Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements,* Report and Order, 1 FCC Rcd. 933 at ¶ 3 & n.10 (1986) (emphasis added).

Global Crossing and petitioners are all non-dominant carriers under the Commission's rules. *See, e.g., Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd. 3271 at ¶¶ 4-5, 7 & n.18 (1995).

22 In fact, petitioners were able to move their end-users to a competing carrier in short order when Global Crossing insisted upon payment of its invoices.

Moreover, with respect to the validity under the Communications Act of minimum usage charges, the Commission articulated the following rationale directly applicable to the inadvisability of granting petitioners the declaratory relief that they seek:

> In approving these provisions (MUGs), the Commission recognized implicitly that they were a *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means of recovering those costs.

Ryder, supra, 18 FCC Rcd at 13617.

In this case, both Petitioners acknowledged, *in the very contract documents that they freely executed*, that they received rate concessions. *OLS, supra,* 556 F. Supp. 2d at 201-03. Petitioners (presumably) read and understood the nature of the commitment that they entered into. Despite this, petitioners *consciously chose* not to fulfill those obligations, and elected to boost their own cash flow by filing baseless disputes.

If petitioners believed that Global Crossing had breached the contracts, petitioner could have brought a breach of contract claim. There is neither need nor warrant to invoke the Communications Act. *Cf. Policies and Rules Regarding the Interstate, Interexchange Marketplace*, Order on Reconsideration, 12 FCC Rcd. 15014 at ¶ 77 (1998) ("[w]e note that the Communications Act does not govern other issues, such as contract formation and breach of contract that arise in a detariffed environment."). Indeed, petitioners brought breach of contract claims **and** Communications Act claims ***and lost on both sets of counts.*** For the Commission even to entertain this petition is bad public policy as it will no doubt invite disappointed litigants to seek a second bite at the apple.

Actually granting the petition would be even worse public policy. Underlying carriers will no longer be willing (likely) to make the investments or incur the costs or provide rate concessions to their wholesale customers if they are unable to negotiate revenue commitments in exchange for those commitments. Resale carriers will be left essentially to buy at "list" under short term agreements. This will certainly not encourage the continuation of a healthy resale industry as petitioners envision.

OLS and TeleUno are asking the Commission to void an agreement into which they freely entered simply because they do want to perform **and after they have already had their day in Court.** Even if the Commission, at this late date, were free to grant the petition and jettison over twenty years of precedent (*but see, e.g., Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto Ins. Co.,*463 U.S. 29, 57 (1983), its doing so would constitute remarkably bad public policy.

Conclusion

The Commission should dismiss the petition for failure to satisfy the requirements of section 1.2 of the Commission's rules. Alternatively, the Commission should deny the petition in its entirety.

Respectfully submitted,

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September 1, 2009

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GLOBAL CROSSING BANDWIDTH, INC., A California corporation, Plaintiff, vs. OLS, INC., a Georgia corporation, And TELEUNO, INC., A Delaware corporation, Jointly and severally, Defendants/Counter-Plaintiffs.	Civil Action No.: 05CV6423(L/P)

DEFENDANTS' RESPONSE TO GLOBAL CROSSING BANDWIDTH, INC.'S SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Defendants, OLS, Inc. ("OLS") and TeleUno, Inc. ("TeleUno") (collectively referred to as "Defendants") by and through their attorneys, and pursuant to the provisions of federal Rules of Civil Procedure 33 and 34, set forth below their responses and objections to Plaintiff Global Crossing Bandwidth, Inc.'s ("Global Crossing") Second Set of Interrogatories and Requests for Production of Documents.

8. Unless otherwise indicated, Defendants will not provide any information encompassed by the foregoing objections.

9. For these reasons, and without waiving its right to raise other objections at the appropriate time, Defendants object to Global Crossing's Second Set of Interrogatories and Requests for Production of Documents. Defendants incorporate each of the foregoing General Objections into each and every answer below, and subject to and without waiving these General Objections, Defendants respond specifically as follows:

RESPONSES TO INTERROGATORIES

1. Identify by name, business address, occupation, and telephone number the individuals who answered, assisted in answering, or collected information to prepare the answers for these Discovery Requests.

ANSWER:

Michele ("Shelley") Jones
Accounting Manager of OLS, Inc. and TeleUno, Inc.
217 Roswell Street, Suite 100
Alpharetta, Georgia 30004

Geri Eubanks
Vice President of OLS, Inc.
217 Roswell Street, Suite 100
Alpharetta, Georgia 30004

2. Please identify each occasion after December 9, 2003 when "Global Crossing invoiced [Defendants] for rates other than those required" by the parties' agreement, as alleged in paragraphs 130-132 (Count I) of your Counterclaim. Include in your answer (a) the rate you were charged, (b) the rate you believe you should have been charged, (c) when you learned of the alleged discrepancy, (d) all persons with knowledge of the discrepancy and the substance of the information possessed by each, (e) all documents

relating or referring to your claim, including any dispute documents and (f) all damages you contend you suffered as a result, including the method of calculating same.

ANSWER:

Without waiving any and subject to its General Objections, Defendants respond:

None.

3. Please identify each occasion after December 9, 2003, when you received a customer complaint as a result of Global Crossing allegedly charging you incorrect rates, as alleged in paragraphs 144-145 (Count I) of your Counterclaim. Include in your answer (a) the identification of each such complaint, (b) all persons with knowledge of the complaints and the substance of the information possessed by each, (c) all documents relating or referring to the complaints; and 9d) all damages you contend you suffered as a result, including the method of calculating same.

ANSWER:

Without waiving any and subject to its General Objections, Defendants respond:

None.

4. Please identify each occasion after December 9, 2003, including the date, when you contend you were "caused" to bill a customer an incorrect rate as a result of Global Crossing allegedly billing you an incorrect rate, as alleged in paragraph 147 (Count I) of the Counterclaim. Include in your answer, (a) all persons with knowledge of your contentions and the substance of the information possessed by each, (b) all documents relating or referring to your contentions and (b) all damages you contend you suffered as a result, including the method of calculating same.

ANSWER:

Without waiving any and subject to its General Objections, Defendants respond:

None.

5. Please identify each "inaccurate rate" specified in paragraph 181 (Count IV) and 188 (Count VI) of your Counterclaim billed after December 9, 2003. Include in your answer (a) the rate you were charged, (b) the rate you believe you should have been

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Please produce all documents reviewed, referenced or relied upon in your answers to these Discovery Requests. If the documents have previously been produced, please identify, by bates-numbers, which specific documents support which claims.

Response to No. 1:

Defendants object to this Request because it is overly burdensome and seeks documents already produced to or in the possession of Plaintiff. Without waiving this objection of their General Objections, all non-privileged responsive documents are attached hereto at Exhibit A.

2. If not already produced or identified in response to Document Request No. 1, please produce any and all documents that you rely on to support any of your claims, contentions, or alleged damages or setoffs.

Response to No. 2:

Defendants object to this Request because it is vague, overly broad and burdensome and seeks documents already produced to or in the possession of Plaintiff. Without waiving this objection of their General Objections, all non-privileged responsive documents are attached hereto at Exhibit A.

Respectfully submitted,

OLS TELECOM, INC
TELEUNO, INC.

By: ______________________
Charles H. Helein
Helein & Marashlian, LLC
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VERIFICATION OF RESPONSE

I Geri Eubanks, in accordance with Rule 33(b) of the Federal Rules of Civil Procedure, declare that:

1. I am the Vice President and Chief Financial Officer ("CFO") of OLS, Inc. and TeleUno, Inc.

2. I have read the foregoing "Defendants' Responses to Global Crossing bandwidth, Inc.'s Second Set of Interrogatories and Request for Production of Documents (the "Response"), and, while I do not have personal knowledge of all of the facts recited in the Response, the information contained therein has been collected by me or made available to me by others, and said allegations and statements made in the Response are true to the best of my knowledge and belief based upon the information made available to me, and therefore the foregoing Response is certified on behalf of OLS, Inc. and TeleUno, Inc.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 28, 2009.

Geri Eubanks, Vice President/CFO
OLS, Inc.
TeleUno, Inc.

Certificate of Service

I hereby certify that on this 1st day of September, 2009, copies of the foregoing Comments of Global Crossing Telecommunications, Inc. were served by electronic mail upon the following:

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